No. 15

In the Supreme Court of the United States

OCTOBER TERM, 1945

HARRY E. WHITE, PETITIONER

vs.

WM. F. STEER, COLONEL, INFANTRY, UNITED STATES ARMY, PROVOST MARSHAL, CENTRAL PACIFIC AREA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the District Court (R. 57–73) is not reported. The opinions rendered in the Circuit Court of Appeals (R. 706–750) are reported at 146 F. (2d) 576.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on November 1, 1944 (R. 751). The petition for a writ of certiorari was filed on December 29, 1944 and was granted on February

12, 1945 (R. 753). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a military provost court, established by the military commander under martial law proclaimed by the Governor of Hawaii and approved by the President under the Hawaiian Organic Act (48 U. S. C. 532), had lawful power to try the petitioner, a civilian, for embezzlement in violation of Section 5840, Revised Laws of Hawaii, 1935.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

These are printed in the Appendix of the Government's brief in *Duncan* v. *Kahonamoku*, No. 14, this Term, to be argued with this case.

STATEMENT

Establishment of Martial Law.—For a detailed statement of the establishment, modification and termination of martial law in the Territory of Hawaii, the Court is referred to the Government's brief in *Duncan* v. *Kahanamoku*, No. 14 this Term, to be argued herewith (Br. pp. 3–8). The principal facts pertinent to this case are that on December 7, 1941, the Governor of the Territory issued a public proclamation stating that pursuant to Section 67 of the Organic Act of Hawaii the privilege of the writ of habeas corpus was suspended until further notice, and the Territory

was placed under martial law (R. 74–75). In that Proclamation the Governor also requested the Commanding General, Hawaiian Department, during the emergency and until danger of invasion was removed, to exercise all the powers normally exercised by the Governor and by the judicial officers and employees of the Territory and such other and further powers as the emergency might require (R. 74–75). On the same day the Governor telegraphed the President that he had declared martial law and suspended the privilege of the writ, and on December 9 the President telegraphed his approval of this action of the Governor (R. 76).

Following the Governor's proclamation, on December 7, 1941, Lt. Gen. Walter C. Short, Commanding General, Hawaiian Department, issued a public proclamation declaring that in compliance with the aforesaid requests of the Governor he was assuming the position of Military Governor, that necessary ordinances governing the conduct of the people of the Territory would be published, and that offenders would be punished by military tribunals or held in custody until such time as the civil courts could function (R. 77–79). On December 7, 1941, General Short issued General Orders No. 4, establishing a system of military courts to try civilians for violations of laws of the United States and of the Territory, and of rules, regulations, orders or policies of the military au-

thorities, by the procedures prescribed for special and summary courts martial (R. 79–81).

On December 8, 1941, an order of the Chief Justice of the Supreme Court of the Territory, under the direction of the Commanding General, stated that all courts of the Territory would be closed until further notice (R. 81) and the civil courts were immediately replaced by provost courts (R. 119, 126–127).

General Orders No. 29, dated December 16, 1941, authorized the civil courts of the Territory to open to a limited extent for the trial of limited classes of cases not requiring jury trials or the subpoenaing of witnesses (R. 82–85). General Orders No. 57, dated January 27, 1942, authorized the civil courts, as agents of the Military Governor, to exercise their normal functions except for jury trials, writs of habeas corpus, and other specified classes of cases (R. 86–88).

The petitioner's offense.—On August 20, 1942, the petitioner, a citizen of the United States engaged in the brokerage and investment business in Honolulu and not connected with the armed forces, was arrested by representatives of the Provost Marshal of Honolulu and placed in the city jail (R. 60). On August 22 he was brought before the provost court and orally informed of the charge of embezzlement growing out of his conduct of his business in violation of Chapter 183 of the Revised Laws of Hawaii, 1935 (R. 60). A plea

entered by his attorney, objecting to the provost court's jurisdiction over the subject matter and the petitioner's person, was overruled and his demand for a jury trial was denied (R. 60–61). A motion for a continuance, supported by an affidavit of petitioner's attorney stating that he needed more time to study the facts of the case and that he had been visiting a doctor daily for ten days on account of an arm injury, was denied (R. 61). On August 25 petitioner was tried and convicted in the provost court for embezzlement in that he fraudulently converted and disposed of 500 shares of Aircraft Accessories stock, 100 shares of Vulte Aircraft stock, and 100 shares of White Motor stock of a total value of $3,239.64. He was sentenced to a term of five years' imprisonment which was reduced to four years (R. 16, 61).

Habeas corpus proceeding.—On April 14, 1944, a petition for a writ of habeas corpus was filed in the United States District Court for the Territory of Hawaii alleging that petitioner was, and since August 25, 1942 had been, an inmate of Oahu Prison (R. 4–5); that his trial and conviction in the provost court violated his rights under the Fifth and Sixth Amendments of the United States Constitution (R. 7); that his trial was unfair (R. 7); that martial law ceased to exist legally in the Territory prior to his trial on August 25, 1942 (R. 8); that on that date the

courts of the Territory were able and ready to perform their normal functions, and no imminent danger of invasion existed to justify denying him a trial before the proper courts of the Territory (R. 8), and that no military necessity existed for his trial before a military tribunal (R. 9).

The answer to the petition, which was also the return to the writ (R. 100), alleges that on August 25, 1942, military necessity required petitioner's trial in the provost courts established by the military commander in good faith and in the honest belief that military necessity required their existence and operation (R. 31–32).

The petitioner's traverse alleges that martial law legally expired in the Territory on a date substantially prior to August 25, 1942, and that the privilege of the writ was fully restored as a matter of law prior to that date (R. 37–38); that the provost court had no right to try him for an indictable offense under the laws of the Territory for the crime of embezzlement involving moral turpitude (R. 40).

On the return of the writ the petitioner was produced and released on bail of $500 over the Government's objection (R. 100). It was stipulated that exhibits and testimony in the similar case of *Duncan* v. *Kahanamoku* might be received in evidence without objection (R. 43–48) and they were so received at the hearing in the District Court on April 20, 1944 (R. 101).

The military situation.—The testimony of General Richardson and Admiral Nimitz was stipulated to the effect that General Richardson assumed command of the Territory on June 1, 1943 and Admiral Nimitz on December 18, 1941, and that their testimony in the *Duncan* case was equally applicable to the period of August 20–25, 1942 and to the offense involved herein (R. 56).

Governor Stainback's testimony was stipulated to the effect that the civil population in the Territory was orderly and in his opinion enemy invasion of the Territory was not imminent and the trial of civilians before military tribunals for offenses against the laws of the Territory was unnecessary during the period of August 20–25, 1942; that the need and justification for martial law expired within a period of three months after December 7, 1941; that a search of the records of his office after he became Governor on August 24, 1942, failed to reveal that the proclamations of December 7, 1941 by Governor Poindexter and General Short were submitted to, or approved by the President, and that he concluded that they had never been submitted to the President and the Secretary of the Interior for approval (R. 49–50). The testimony of Samuel B. Kemp, Chief Justice of the Supreme Court of the Territory since June 20, 1941, was stipulated to the effect that during the period of August 20–25, 1942, the courts of the Territory were ready, willing, and prepared to

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perform their normal judicial functions; that after the month of April, 1942, he knew of no sound reason for denial of trial by jury to civilians charged with criminal offenses under the laws of the Territory and that the only reason assigned in his discussion with the military authorities regarding the reopening of the courts was that jury trials might require the attendance of persons engaged in war work and their occasional absences from employment (R. 53).

In addition to the testimony of Admiral Nimitz and General Richardson on the imminence of invasion, and General Richardson's opinion that military necessity required trial of petitioner's offense in a military tribunal, certain well-known historical facts pertinent to the period of August 20–25, 1942, may be mentioned briefly. At the time of petitioner's trial on August 25, 1942, the Japanese successful military offensive still continued. In addition to the occupation of Hong Kong, the Malay Peninsula, Singapore, the Dutch East Indies, and bases in New Guinea, the Japanese enemy had successfully occupied our own territories of Guam and Wake which, with Midway, constituted the important island chain connecting Hawaii with the Philippines. Then the Philippines were occupied. The enemy's occupation of the Solomon Islands, including Tulagi and Guadalcanal, gave him advance air and naval bases for offensive operations against our South

Pacific supply line and the north coast of Australia. General Marshall's Report (1943) p. 14.[1]

Early in May, 1942 one Japanese attempt to extend enemy control southeastward along the borders of the Coral Sea with the ultimate objective of an attack on Australia, was repulsed in the Battle of the Coral Sea. The Japanese offensive, however, continued. In early June the Japanese attempt to occupy Midway Island preliminary to an invasion of Hawaii was thwarted in the Battle of Midway. (R. 344–346.) At the same time, however, Japanese forces occupied our territory of Attu, Agattu and Kiska in the Aleutian Islands. General Marshall's Report, *supra*, at p. 30.[2] Japanese advances in New Guinea continued during the summer of 1942 and by September, 1942 had forced Allied ground forces back to within 30 miles of Port Moresby, a gateway to Australia. General Marshall's Report, *supra*, at p. 14. On August 7 a landing was made on Guadalcanal by United States forces (R. 343, General Marshall's Report at p. 14). For a time it did not appear that the effort to wrest this crucial island from the Japanese could succeed. A strong Japanese attempt to recapture Guadalcanal was

[1] *Biennial Report of the Chief of Staff of the United States Army to the Secretary of War (1943)*, p. 14 (House Doc. 288, 78th Cong., 1st Sess.); McInnis, *The War, Third Year*, p. 238 (1942).

[2] These islands were not recovered until May, 1943. *General Marshall's Report*, p. 31.

beaten off as late as November 16, 1942 (R. 339). Not until early in 1943, was enemy resistance on Guadalcanal overcome. *General Marshall's Report*, p. 14. Even then our forces had only succeeded in checking the enemy's offensive and had not launched their own offensives or ousted the enemy from any American territory. The American offensive in the Central Pacific did not begin until a year later with the invasion of the Gilbert Islands in November, 1943, followed by invasion of the Marshall Islands in January, 1944, and the invasion of the Mariana Islands in July, 1944. General Marshall, *The Winning of the War in Europe and the Pacific* (1945).[3] Our forces landed on Guam on July 21 and resistance ceased on August 10. By that time our forces in the Southwest Pacific under General MacArthur had reduced or by-passed the enemy's footholds in New Guinea and the way was prepared for the Battle of the Philippines which began with the landing on Leyte on October 20, 1944. *The Winning of the War in Europe and the Pacific, supra.*

The District Court held that assuming a valid state of martial law to have existed in Hawaii in August, 1942, the petitioner was deprived of his constitutional rights under the Fifth and Sixth Amendments because there was no military necessity for the trial of petitioner in a provost court

[3] *Biennial Report of the Chief of Staff of the United States Army to the Secretary of War* (1945).

(R. 67). The court below held that the military authorities were authorized to try the petitioner for the offense involved and that therefore his imprisonment was lawful (R. 720).

SUMMARY OF ARGUMENT

On December 7, 1941 the Governor of the Territory of Hawaii, pursuant to the provision of Section 67 of the Organic Act of Hawaii authorizing martial law, placed the Territory under martial law and requested the military commander to exercise judicial and other functions of the civil government. At the time of petitioner's trial for embezzlement in the provost court, complete martial law prevailed and was not modified by the Governor until his Proclamation of February 8, 1943. The Constitution of the Republic of Hawaii, as construed by its Supreme Court, authorized complete martial law, including military trials of offenders against the criminal laws of the Republic, if the military authorities deemed such trials necessary. Such action was subject to judicial review only for an abuse of discretion. In Section 67 of the Organic Act Congress adopted this provision of the Constitution of the Republic of Hawaii and thereby authorized martial law in the Territory as it prevailed under the Republic.

The extension of the United States Constitution to Hawaii by the general provision of Sec-

tion 5 of the Organic Act did not limit or restrict martial law as authorized by Section 67. Even if the United States Constitution applies fully to the Territory of Hawaii, the exercise of martial law involved in the trial of petitioner was constitutional because it was not unreasonable for the military authorities to determine that military necessity required that such trials be conducted in military tribunals under the conditions prevailing in the strategic military and naval base of Hawaii in August, 1942. On such a question the courts will not substitute their judgment for that of the executive authorities charged with responsibility for the conduct of the war and the defense of the Hawaiian Islands.

ARGUMENT

The petitioner's principal contention is that his trial in the provost court was prohibited by the Constitution (Br. 13–22). The Government's argument that Congress, in expressly authorizing martial law, authorized trial of criminal offenses by military tribunals during a period of martial law and that the Constitution, as applied to Hawaii, does not invalidate this procedure, is presented in the Government's brief in the *Duncan* case, No. 14, this Term, to be argued herewith. There are presented here those considerations believed to be particularly pertinent to the time of petitioner's trial on August 25, 1942.

I

THE HAWAIIAN ORGANIC ACT CONSTITUTIONALLY AUTHORIZED THE TRIAL OF EMBEZZLEMENT OFFENSES IN PROVOST COURTS IN AUGUST, 1942

At the time of petitioner's trial in the provost court on August 25, 1942, the Governor had issued no proclamation modifying the proclamation of December 7, 1941 placing the Territory under martial law and expressly authorizing and requesting the military commander to exercise the powers of the Governor, judicial officers, and employees of the Territory during the emergency.[4] It has not been urged that the initial establishment of complete martial law was in bad faith or an abuse of discretion or not required by military necessity at the time of the attack on Pearl Harbor. It has been asserted, however, that the military situation had so greatly improved that any necessity for martial law in the trial of the petitioner's case ceased, and therefore the legal basis for such a trial ceased, within a few months after the attack on Pearl Harbor (R. 49, 53). The District Court concluded that after the Battle

[4] General Order No. 133, dated August 31, 1942, extended the jurisdiction of the civil courts to jury trials, and General Orders No. 135, dated September 4, 1942, enumerated the criminal offenses against the government or related to the war effort in respect of which the civil courts were not authorized to exercise jurisdiction (*Duncan* Brief, Appendix, pp. 86–93), and thereafter offenses such as petitioner's were tried in the civil courts.

of Midway in June, 1942, the danger of a land invasion of Hawaii was removed (R. 62). A consideration of the undisputed historical facts now available, however, makes it evident that the exercise of the criminal jurisdiction delegated by the Governor in proclaiming a state of martial law was not an abuse of discretion and therefore was within the scope of martial law expounded in *In re Kalanianaole*, 10 Hawaii 29, and authorized by Congress. Brief in No. 14, pp. 22–38. It is also submitted that the petitioner's trial in the provost court under a declared state of complete martial law was reasonably deemed to be required by military necessity and therefore was constitutional under the tests that would be applicable in the continental United States. Brief in No. 14, pp. 57–~~59~~ 74. It is true that his offense was not against military orders, like Duncan's; but considerations applicable to the time he committed it and was tried bring the proceedings and the resulting imprisonment under the martial law power.

Petitioner sought a writ of habeas corpus almost two years after he had entered prison pursuant to his conviction for embezzlement. The views expressed in the habeas corpus proceeding in April, 1944, to the effect that the imminent danger of invasion and the need for martial law in the interest of public safety had terminated three or four months after the Pearl Harbor attack are not only contrary to the Governor's

official action in continuing the Proclamation of December 7, 1941 in force and effect until March 10, 1943, but also are based on the fundamental error of appraisal of the military situation in August, 1942 in the light of the success of our armed forces thereafter and up to April, 1944. The reasonableness of the judgment expressed in the Governor's Proclamation of December 7, 1941 and in the military commander's Proclamation and General Orders, that martial law should continue and include trial of petitioner's offense on August 24, 1942, must be judged not by the subsequent successes of our arms, but in the light of the situation when the Governor issued the Proclamation of December 7, 1941 and when the petitioner was tried on August 25, 1942. *Korematsu* v. *United States*, 323 U. S. 214, 224; *Hirabayashi* v. *United States*, 320 U. S. 81, 93–94; *Moyer* v. *Peabody*, 212 U. S. 78, 85; *Mitchell* v. *Harmony*, 13 How. 115, 134.

It is true that in the Battle of Midway one Japanese offensive attack to occupy the Hawaiian Islands was beaten off, but the Japanese attack launched at the same time succeeded in occupying Kiska and Attu in the Aleutian Islands. The defeat at Midway did not stop the general Japanese offensive or even eliminate the possibility of another offensive toward Midway and Hawaii. At the time petitioner was tried in the provost court, August 25, 1942, the successful Japanese offensive

in New Guinea was continuing. The force of Marines which had been landed on Guadalcanal on August 7, 1942, to block the Japanese offensive southward which threatened our supply line to Australia, was struggling to hold its beachhead against superior enemy forces. It is impossible to say even today what effect the loss of Guadalcanal would have had on prolonging the war in the Pacific. In August, 1942, from the viewpoint of the military authorities responsible for the security of the Hawaiian Islands and Midway, the only United States territory in the Pacific not already occupied by the Japanese, the battle then raging on Guadalcanal was of the gravest importance. The initiation of offensive and defensive plans in the Central Pacific depended on its outcome and that outcome was not clear until months after the petitioner's trial on August 25, 1942. It would appear that on that date the military authorities were justified in maintaining martial law without relaxation, because of the dangers still threatening.

The governmental control of the Territory in time of war with Japan was complicated by the fact that 37.3%, or 157,905 persons (R. 520) of the entire population of 423,330, were persons of Japanese ancestry, and a substantial portion of them were Japanese nationals. Criminal jury trials, even for security offenses, could not have been conducted without citizens of Japanese an-

cestry. It is true that the Japanese and Japanese-American population in the Islands as a whole has an excellent record of loyalty; but throughout the war, and particularly at a time when the extent and success of Japanese offensive military efforts were still an unknown military quantity and the United States had not succeeded in launching offensive operations, certainly the responsible authorities were justified in taking all possible precautions, including the maintenance of complete martial law, while conducting military operations in such a strategic area as Hawaii, under the conditions there prevailing. *Korematsu* v. *United States, supra; Hirabayashi* v. *United States, supra.* The court below correctly stated that "the mere assembly of juries and the carrying on of protracted criminal trials might well constitute an invitation to disorder as well as an interference with the vital business of the moment. And the summary punishment of criminal offenders of every sort might conceivably serve to discourage the commission of offenses immediately endangering the general security" (R. 716).

It is submitted that in all the circumstances it cannot be said that the trial of petitioner by a provost court was either an abuse of the exercise of the complete martial law authorized by Section 67 (Point I, *Duncan* brief) or, if the Constitution applies, that there was no reasonable basis

for the view of the military authorities that military necessity required such trials in provost courts in August, 1942 (Point II, *Duncan* brief).

II

THE PETITIONER'S TRIAL IN THE PROVOST COURT WAS NOT UNFAIR

Petitioner contends (Br. 28–34) that his trial was basically unfair in that he was not supplied with a written copy of the charge of embezzlement on which he was tried, and also in that he was tried five days after his arrest and three days after his arraignment, and a motion for a continuance was denied. The District Court did not pass on these contentions. The court below ruled that there was nothing in the showing made in the case which would warrant release on habeas corpus on the ground of an unfair trial and pointed out that the District Court did not make any finding of unfairness in the conduct of the trial (R. 727).

The petition for a writ of habeas corpus alleges that petitioner was brought before the provost court in the courtroom of the district magistrate of Honolulu and informed that he was to be tried before the provost court on a charge of embezzlement growing out of the conduct of his brokerage and investment business and in violation of Chapter 1831, Revised Laws of Hawaii, 1935, and that

he was never furnished a copy of the charge or accusation against him (R. 5–6). The petition does not allege that petitioner requested a copy of the charge. There are annexed to the petition a copy of the written plea to the jurisdiction of the provost court, a copy of the written demand for a jury trial, and a copy of the motion for a continuance supported by an affidavit of petitioner and an affidavit of his attorney, all of which were captioned in the provost court and were filed therein by petitioner's attorney prior to the provost court trial (R. 10–15). In none of these documents, including the affidavit of petitioner's attorney which discloses a knowledge of the nature of the charge, is any request made for a copy of the charge.[5] The answer to the petition admits the allegation of the petition that petitioner was not served with a copy of the charge and alleges that at the time of his arrest he was advised of the nature and cause of the accusation against him and at the time of his arraignment in the provost court he was orally advised of the nature and cause of the accusation in lieu of furnishing him with a copy of the charge of accusation (R. 25). Petitioner's traverse does not deny or otherwise

[5] The charge is set forth in the order of the provost court to the provost marshal and to the warden of Oahu Prison for the imprisonment of petitioner and this order is annexed as an exhibit to the petition (R. 15–17).

plead to these allegations of the answer to the petition (R. 37-41). Petitioner did not offer any evidence on the question of the notification to him of the charge against him.

No statute or military order applicable to the provost court required that petitioner be given a copy of the charge. In view of this fact and the fact that it appears that petitioner and his attorney were actually apprised of the nature of the charge and did not request a copy of the charge, it is submitted that in this respect it cannot be said that the trial was unfair.

The petitioner also contends that the denial of a continuance rendered the provost court trial unfair (Br. 30). The allegations of paragraph X of the petition for a writ of habeas corpus, which state that the trial was unfair and that petitioner was given only a semblance of a trial (R. 7), were denied in paragraph 10 of the answer to the petition (R. 26). The petitioner offered no evidence on this question and the record does not establish that the petitioner was prejudiced by the denial of a continuance. Under the procedure established for the provost courts (R. 187) the conviction and sentence were reviewed and the sentence reduced from five to four years (R. 482). In view of the record it is submitted that the court below correctly held that no showing of unfairness of the provost court trial was established (R. 727, 749).

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted.

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